No. 15,117

United States Court of Appeals

For the Ninth Circuit

NEW & USED AUTO SALES, INC., a corporation,
Appellant,

vs.

BERNARD L. HANSEN, also known as Barney Hansen, and Suzanne Hansen,
Appellees.

BRIEF OF APPELLANT.

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I.

JURISDICTION AND PLEADINGS.

A. Jurisdiction.

The jurisdiction of the District Court was invoked under the act of June 6, 1900, C. 786, Section 4, 31 Statutes 322, as amended, 48 U.S.C.A., Section 101. The jurisdiction of the Court of Appeals rests on Section 1290 of the new Federal Judicial Code, and Federal Rules of Civil Procedure.

This is an appeal from a summary judgment. The pertinent pleadings are set forth below.

B. Pleadings.

On December 9, 1955, the plaintiff, Appellant herein, filed a complaint to replevin one 1955 Pontiac automobile, which automobile was in the possession of the defendants, Appellees herein, the conditional vendees of the vehicle. (R 3-5.) An affidavit, necessary for the replevin action, was prepared for the Marshal and the Marshal was directed to pick up the automobile by the notice attached to the affidavit. (R 18-20.)

On December 20, 1955, a motion for summary judgment was filed by the Appellees (R 6) and a notice of motion was filed at the same time. (R 5.) This motion was supported by an affidavit of Bernard L. Hansen, one of the Appellees, which was executed on December 20, 1955. Another affidavit was also filed in support of the motion bearing the same date. (R 13-14.)

An affidavit in opposition to the motion for summary judgment was filed on December 21, 1955. (R 14-17.) The Court determined the motion for summary judgment by a minute order on January 6, 1956. (R 20.) Then the Appellant filed objections to proposed findings of fact and conclusions of law and proposed judgment. (R 21-22.) The objections were supported by an affidavit executed and filed on January 11, 1956. (R 22-25.) The findings of fact and conclusions of law and the judgment were signed on the 26th day of January 1956. (R 25-30.) After hearing on findings of fact and conclusions of law and judgment (R 30-31), Appellant filed a motion for new trial and to set aside judgment and to strike. (R 31-

33.) The hearing was held on this motion (R 33-34) and the motion was denied by an order dated February 3, 1956. (R 35). Notice of appeal was then filed on February 6, 1956. (R 38.)

II.

STATEMENT OF THE CASE.

On the 31st day of December, 1954, the Appellees herein, Bernard L. Hansen and Suzanne Hansen, entered into a conditional sales contract with the Appellant for the purchase of one 1955 Pontiac automobile. (R 3.) Part of the down payment on the automobile was made by a check in the amount of more than Three Hundred Dollars ($300.00). (R 16.) This check was dishonored by the bank and when the Appellees picked up the check, part of the payment was made by another check in the amount of Two Hundred Twenty-five Dollars ($225.00). (R 15.) The second check in the amount of Two Hundred Twenty-five Dollars ($225.00) also bounced (R 16), and suit was brought on this second check of Two Hundred Twenty-five Dollars ($225.00) in the local Justice's Court. Action in that matter is still pending, since the case was appealed from the Justice's Court to the District Court. (R 17.)

The second bad check in the amount of Two Hundred Twenty-five Dollars ($225.00) was given by the Appellees to the Appellant after the first repossession of the automobile, sometime during the month of

August, 1955. (R 15.) Thus the Appellees got possession of the vehicle again by the somewhat questionable method of paying off one bad check with another bad check. Sometime after this transaction they permitted the conditional sales contract to be in default again and the Appellant repossessed the vehicle for the second time. (R 16.)

After obtaining possession of the vehicle upon the second repossession, the Appellant had the car placed on the car lot. While the car was in the possession of Appellant, Appellee Bernard L. Hansen took possession of the vehicle, without the consent of the Appellant, and drove the car off by using a second set of keys which he had in his possession. (R 16.) After the illegal retaking of the vehicle by the Appellee, the employees of Appellant attempted to get possession of the car again through peaceful means. (R 16.) However, the Appellee prevented such a repossession by a threat of force through the brandishing of a gun. (R 16.) Upon advice of counsel, the Appellant company brought the replevin action to obtain the possession of the vehicle through legal process. (R 16.) Upon the furnishing of an affidavit and directions to the Marshal, the vehicle was repossessed and taken into the custody of the U. S. Marshal on the 14th day of December, 1955. (R 7, 23.) The vehicle was apparently turned over to the Appellant on the 17th day of December, 1955. (R. 23.) Before the Marshal would repossess the vehicle for the Appellant, however, a corporate undertaking was required and such an undertaking was presented to the Marshal.

Although this action was started by a complaint, no answer was ever filed by the Appellees. A motion for summary judgment was prepared, served and filed three (3) days after the Appellant got possession of the vehicle, namely, on the 20th of December, 1955. (R 6.) This motion for summary judgment was noticed for hearing on the 23rd day of December, 1955, which was just three days after preparation, service and filing of the motion for summary judgment. (R 5.) A hearing on the motion was started on December 23, 1955 (R 42), and on January 6, 1956 the Court entered a minute order rendering oral decision in this matter, granting motion for summary judgment, and although the Court indicated in his minute order that "counsel are to appear at a later date for testimony as to the accuracy of the statement of plaintiff", no such testimony was ever introduced. (R 20-21.) When the Court referred to "plaintiff" he must have meant "defendant", since "plaintiff" was not asking for summary judgment.

Findings of fact and conclusions of law and judgment were prepared and served upon counsel for Appellant and counsel for Appellant filed objections to the proposed findings of fact and conclusions of law and proposed judgment (R 21), with the objections supported by an affidavit of the attorney representing Appellant. (R 22-25.) Argument was held on the findings of fact, conclusions of law and judgment on January 31, 1956. (R 30-31.) The result of the argument was that the Court sustained the previously entered judgment and in addition orally ordered the Appel-

lant to return the automobile to the Appellees. (R 31.) The judgment was an award to the Appellees of one-quarter (¼) of the sum allegedly paid in by the Appellees upon purchase price of the vehicle. (R 30.)

On the same day that argument was started on the motion for summary judgment, namely, on December 23, 1955, a statement was served upon the counsel for the Appellees, setting forth the amount, due Appellant, which amounts were necessary to reinstate the contract and which also included the costs of retaking, keeping and storage. (R 17-18.) This statement set forth the items as follows:

Delinquent installment due Dec. 3, 1955	$120.84
Late charge on delinquent installment	6.04
Cost of undertaking by Continental Casualty Co.	40.00
Cost of storage	5.00
Cost of filing suit	27.00
Marshal's fee in claim and delivery action	15.80
Total	$214.68

The Appellees at no time made an offer to pay this Two Hundred Fourteen and 68/100 Dollars ($214.68) even though the Court instructed counsel for the Appellees to do so as follows:

> ". . . but I think that you should on behalf of the Defendant, Mr. Biss, tender to them what they do claim as set forth, excepting for the acceleration and then this other matter can be determined at a later date. The Court will stand in recess until call of the gavel." (R. 43.)

The notice of this amount due, namely, the Two Hundred Fourteen and 68/100 Dollars ($214.68), was served upon the Appellee six (6) days after Appellant acquired possession of the vehicle. That is, the Appellant acquired possession of the vehicle on the 17th day of December, 1955 (R 23) and this notice was served upon the Appellees on the 23rd day of December, 1955. (R 24.)

It is true that another statement had been given to the Appellees drawing attention to the acceleration clause of the contract which read as follows:

> "In the event of default in the payment of any of the said installments when due as hereinabove provided, time being of the essence hereof, the holder of this note may without notice or demand declare the entire principal sum then unpaid immediately due and payable." (R 12.)

Regardless of this first notice, the Appellant did serve the notice that the sum of Two Hundred Fourteen and 68/100 Dollars ($214.68) would be accepted and the car turned over to the Appellees upon their payment thereof. This point was again brought to the attention of the Court and Appellees by the Appellant's motion for new trial and to set aside judgment and to strike.

Section 6 of the motion, to which reference is made, is quoted:

> "That the defendant has suffered no actual damages, except through his own refusal to pay the sum in the statement given to defendants on the 23rd day of December, 1955, and also given to

the defendants six days after plaintiff got possession of the vehicle." (R 33.)

Another attempt to get the car back to the Appellees and to have them pay the contract up to date was made on February 6, 1956, and a copy of the notice served upon counsel for Appellees. (R 36-37.) This offer merely requested that the Appellees pay up the delinquent installments and pay the costs of retaking, keeping and storage as set forth in the notice served upon them on the 23rd day of December, 1956. This latter sum amounted to Ninety-three and 84/100 Dollars ($93.84), and was actually less than the actual cost to Appellant for the reason that this sum included storage in the total amount of Five Dollars ($5.00) and only one late charge of Six and 04/100 Dollars ($6.04). Regardless of the reasonableness of the offer, the Appellees refused to accept, with the result that the car has never been returned to them.

It should also be noted that, even by the affidavits of Appellees, the Appellant offered to turn the car back to the Appellees for the payment of the sums that were justly due Appellant, namely, the costs of retaking, keeping and storage and the delinquent installment plus the sum of Two Hundred Twenty-five Dollars. ($225.00.) This last sum was part of the down payment paid by the bad check which was dishonored. (R 11, 13-14.)

It is the Appellant's position that all material questions of fact are not only in dispute, but that the material questions of fact that were determined by the Court are actually contrary to the record. Paragraphs

I, II, III of the findings of fact are not in issue, but are admitted and were actually pleaded in the complaint. These three paragraphs merely set forth the contract, the default of the contract, and the repossession of the vehicle. However, paragraphs IV and V (R 27) are the findings of fact upon which the judgment for one-quarter of the amount allegedly paid in was awarded to the Appellees. It is upon these findings that this case primarily turns.

III.

SPECIFICATIONS OF ERROR.

(1) That the Lower Court erred in basing its judgment herein upon a material question of fact which is in dispute.

(2) That the Lower Court erred in making findings of fact that are contrary to the record.

(3) That the Lower Court erred in making findings of fact based solely upon the affidavits of defendants, Appellees herein.

(4) That several genuine issues of material fact are in dispute and have never been admitted by Appellant, but on the contrary, said issues have been denied by Appellant and evidence offered.

(5) That the motion for summary judgment was set for hearing three days after the filing and serving of said motion, contrary to Rule 56 (c) of the Federal Rules of Civil Procedure, and the Lower Court erred in hearing said motion three days after service upon Appellant.

(6) That the Lower Court erred in rendering a decision on the motion for summary judgment before counsel for plaintiff, Appellant herein, had presented argument.

(7) That the motion for summary judgment was not properly before the Court since the motion for summary judgment was not responsive to the allegations of the complaint.

(8) That the Lower Court erred in refusing to give effect to an acceleration clause in the conditional sales contract and holding that acceleration clauses are invalid.

IV.

ARGUMENT.

A. THAT THE LOWER COURT ERRED IN BASING ITS JUDGMENT HEREIN UPON A MATERIAL QUESTION OF FACT WHICH IS IN DISPUTE.

THAT THE LOWER COURT ERRED IN MAKING FINDINGS OF FACT THAT ARE CONTRARY TO THE RECORD. (Points 1 and 2.)

Finding of fact IV concerned a very material question of fact and that is whether or not the Appellant furnished the Appellees with a statement of the amount due under the conditional sales contract. The materiality of this particular point rests upon the Conditional Sales Act in force in Alaska and is of major importance to this case. Two sections of the Conditional Sales Act would be pertinent here. One of them is Section 29-2-18, A.C.L.A. (1949), which reads in part as follows:

> ". . . Upon written demand delivered personally or by registered mail by the buyer, the seller shall furnish to the buyer a written statement of the sum due under the contract and the expense of retaking, keeping and storage. For failure to furnish such statement within a reasonable time after demand, the seller shall forfeit to the buyer ten dollars ($10) and also be liable to him for all damages suffered because of such failure. . . ."

The other pertinent section is Section 29-2-25, which reads as follows:

> "Recovery of damages by buyer after retaking goods. If the seller fails to comply with the provisions of Sections 18, 19, 20, 21 and 23 (Secs. 29-2-18, 29-2-21, 29-2-23 herein) after retaking the goods, the buyer may recover from the seller his actual damages, if any, and in no event less than one-fourth of the sum of all payments which have been made under the contract, with interest."

Thus it appears that the Court made the finding of fact that no statement had been given in accordance with Section 29-2-18, and then awarded the Appellees one-quarter of the sum that they had claimed they had paid in. This resulted in a judgment of Six Hundred Seven and 35/100 Dollars ($607.35), which is exactly one-quarter of the sum of Two Thousand Four Hundred Twenty-nine and 40/100 Dollars ($2,429.40) allegedly paid in by the Appellee. (R. 7.) This finding of fact was specifically denied by an affidavit dated January 11, 1956, which stated:

> "Affiant further states that on the 23rd day of December, 1955, he prepared a statement to De-

> fendants and their attorney, setting forth the amount of the delinquent installment in default and the costs of retaking, keeping and storing the vehicle involved herein, and affiant states that he served a copy of said statement upon Defendants' attorney, Burton Biss, on the 23rd day of December, 1955. * * *'' R 23.)

This statement was made on January 11, 1956, to controvert the proposed findings of fact and the record indicates that the findings of fact were not signed by the Court until the 26th day of January, 1956. (R 28.) Thus there was ample time to deny this statement or to offer some other evidence to controvert this statement, but such was never done.

Regardless of the statement denying this particular finding of fact, the record itself indicates that a statement was presented to the Appellees. (R 17-18.) This statement was served on December 23, 1955 and was filed with the Clerk of the District Court on December 24, 1955. (R 18.)

In view of the evidence that was presented, it is difficult to determine just how the Court reached this particular finding of fact. Even the affidavits of the Appellees did not clearly set forth the question of whether or not a written statement was presented, so the only conclusion to be reached is that the Court must have found this particular fact from the argument of Appellees' counsel.

The procedure for summary judgment was not the proper method to use in determining this case, since the Court had to decide several important issues of

fact and these issues were material and genuine. The rule is quite clearly stated in 3 Barron & Holtzoff, Federal Practice and Procedure, 61-62:

> "The summary judgment procedure is not a trial of disputed factual issues . . ."

For a case in which there were less genuine issues of material fact to be determined by the trier of fact than in the case at bar see *Miller v. Miller,* 122 Fed. 2d 209. This case involved the collection of unpaid installments of alimony under a Nevada divorce decree. The payments depended upon the age of the children and whether or not the wife ever remarried. Since the date was already past that at which the children would have reached their majority, the only question would be whether or not the wife had remarried. The wife stated that she had not remarried and the husband alleged that she had. The Appellate Court reversed it on the ground that there was a question of fact, stating at page 212 of its opinion:

> "The children have reached their majority. It follows that, if appellee has remarried, the accrual of further installments of alimony ceased on her remarriage or on the majority of the younger child, whichever occurred later. Since there is a genuine issue as to a material fact, the court should 'make an order specifying the facts that appear without substantial controversy *** and directing such further proceedings in the action as are just.' "

For another case standing for the proposition that the Court cannot try issues of fact by summary judgment, see *Toebelman v. Missouri-Kansas Pipe Line*

Co., 130 Fed. 2d 1016, where the Court states at page 1018 of its opinion in reference to the procedure:

> "Stated conversely, a substantial dispute as to a material fact forcloses summary judgment. *McElwain v. Wickwire Spender Steel Co.,* 2 Cir., 1942, 126 F. 2d 210; *Miller v. Miller,* 1941, 74 App. D.C. 216, 122 F. 2d 209; *Whitaker v. Coleman,* 5 Cir., 1940, 115 F. 2d 305. Upon a motion for a summary judgment it is no part of the court's function to decide issues of fact but solely to determine whether there is an issue of fact to be tried. *Ramsouer v. Midland Valley R. Co.,* D.C. Ark., 1942, 44 F. Supp. 523. All doubts as to the existence of a genuine issue as to a material fact must be resolved against the party moving for a summary judgment. *Weisser v. Mursam Shoe Corporation,* 2 Cir., 1942, 127 F. 2d 344."

For another apt and concise statement on this point, see *Parmelee v. Chicago Eye Shield Co.,* 157 Fed. 2d 582, at page 585 of the opinion wherein the Court states:

> "The proceeding on motion for summary judgment is not to be regarded as a trial, but for the determination of whether or not there is a genuine issue to be tried. *** On such a motion *the burden of proof is on the moving party* to establish that there is no genuine issue of fact and all reasonable doubts are resolved against him. *Walling v. Fairmont Creamery Co.,* 8 Cir., 139 F. 2d 318." (Emphasis supplied.)

As indicated in this case the burden of proof is on the party requesting summary judgment. In the case at bar Appellees have not only failed in not carrying

the burden of proof but the evidence tends to indicate that the exact opposite of the particular finding of fact discussed here is true.

Also see *Preston v. Aetna Life Ins. Co.,* 174 Fed. 2d 10, which stands for the proposition, among other things, that:

> "The federal rule relating to summary judgment should be cautiously invoked."

Three late cases that stand for the proposition that the truth must be clear before summary judgment will lie are *Koepfle v. Garavaglia,* 200 Fed. 2d 191, *Traylor v. Black, Sivalls & Bryson, Inc.,* 189 Fed. 2d 213, and *Chappell v. Goltsman,* 186 Fed. 2d 215.

The *Koepfle v. Garavaglia* case merely indicates, as summarized in the headnote:

> "Summary judgment should not be permitted except where it is quite clear what the truth is."

A clearer and more concise definition of the law on this point is set forth in the *Traylor v. Black, Sivalls & Bryson, Inc., et al.,* case, 189 Fed. 2d 213, wherein the Court states at page 216 of the opinion:

> "A summary judgment upon motion therefor by a defendant in an action should never be entered except where the defendant is entitled to its allowance beyond all doubt. To warrant its entry the facts conceded by the plaintiff, or demonstrated beyond reasonable question to exist, should show the right of the defendant to a judgment with such clarity as to leave no room for controversy and they should show affirmatively that the

> plaintiff would not be entitled to recover under any discernible circumstances. * * *"

The *Chappell* case, 186 Fed. 2d 215, merely indicates, at page 218, that:

> "It is no part of the court's duty to decide factual issues but only to determine whether there are any such issues to be tried. * * *"

With respect to the question of burden of proof and presumptions the cases hold, almost without exception, that doubts will be resolved against the movant. Typical of these cases is the case of *Dulansky v. Iowa-Illinois Gas & Electric Co.,* 191 Fed. 2d 881, wherein the Court stated at page 885:

> "The burden of proof was upon the movant, not upon the plaintiffs, and all doubts are resolved against the movant."

This statement was supported by six cases cited in the opinion, but for other late cases on this question of burden of proof wherein a summary judgment was reversed because of doubts against the movant, see:

Vale v. Bonnett, 191 Fed. 2d 334;
Dewey v. Clark, 180 Fed. 2d 766;
Hunter v. Mitchell, 180 Fed. 2d 763;
Hazeltine Research v. General Electric Co., 183 Fed. 2d 3.

In view of the authorities cited, there can be little doubt but that this point of law is as stated in 3 *Barron & Holtzoff* 81:

> "One who moves for summary judgment has the burden of demonstrating clearly that there is no

genuine issue of fact. Any doubt as to the existence of such an issue is resolved against him. ***"

B. THAT THE LOWER COURT ERRED IN MAKING FINDINGS OF FACT BASED SOLELY UPON THE AFFIDAVITS OF DEFENDANTS, APPELLEES HEREIN. (Point 3.)

The Court below either made the determination as to findings of fact IV and V from the affidavits of Appellees or else the Court must have made the determination from facts not in the record, such as argument of counsel. This is the only conclusion that can be reached, since nowhere in the pleading or affidavits or statements of the Appellant are the facts admitted that are found in the findings of fact IV and V.

The exact opposite of an admission is the case with these two points, since the Appellant expressly denies the facts as found in finding of fact VI and offers the record to show that finding of fact IV is contrary to the evidence. With respect to finding of fact V, the undenied affidavits of Appellant would controvert this finding, at least in part.

One of the affidavits presented on behalf of Appellants indicates that part of the down payment on the vehicle involved in this case was made by a check that was dishonored. There were actually two checks which were dishonored by the bank, but the second one was used to pay, in part, the first. (R 16.) Nevertheless, it stands undenied that the $225.00 bad check is still outstanding. It seems incredible that the Appellees can claim the full amount of Two Thousand Four Hundred Twenty-nine and 40/100 Dollars ($2,429.40),

when part of it was paid by a bad check which has never been made good to this day.

Appellant admits that this item is not of major importance, since the amount paid in would be reduced only by the amount of the bad check. It could, however, have a great deal of bearing on the case if the issue of the amount of payment percentagewise was ever raised. This is true in situations where the conditional sale vendee has paid more than half of the total contract price to the vendor and, in such a case, a different treatment of the chattel is required. It is conceivable that this issue will be raised in this case eventually.

The point herein is closely related to the points urged under heading "A" and that simply boils down to the plain statement that summary judgment should not be granted where there exists a genuine issue of material fact. This Court has even indicated that summary judgment will not be granted even where both sides moved for it as long as there exists a question of fact. *Hycon Manufacturing Company v. H. Koch & Sons,* 219 Fed. 2d 353.

This Court also set forth the rule in this respect in *Griffeth v. Utah Power & Light Company,* 226 Fed. 2d 661, wherein the Court stated at page 669 of the opinion:

> " * * * The remedy can be invoked only when complete absence of genuine fact issue appears on the face of the record. Resort to summary judgment procedure is futile where there is any doubt as to whether there is a fact issue. All doubts

upon the point must be resolved against the moving party. This Rule, on account of these limitations, was not intended to be used as a substitute for a regular trial of cases where 'there are disputed issues of fact upon which the outcome of the litigation depends.' * * *"

The case at bar has one disputed, substantial and genuine question of material fact, in addition to others of less importance. Appellant contends that the summary disposal of this issue is reversible error.

C. THAT SEVERAL GENUINE ISSUES OF MATERIAL FACT ARE IN DISPUTE AND HAVE NEVER BEEN ADMITTED BY APPELLANT, BUT, ON THE CONTRARY, SAID ISSUES HAVE BEEN DENIED BY APPELLANT AND EVIDENCE OFFERED.

THAT THE LOWER COURT ERRED IN RENDERING A DECISION ON THE MOTION FOR SUMMARY JUDGMENT BEFORE COUNSEL FOR PLAINTIFF, APPELLANT HEREIN, HAD PRESENTED ARGUMENT. (Points 4 and 6.)

Throughout the proceedings on the motion for summary judgment the Appellant has attempted to offer evidence and argument in opposition to the motion for summary judgment. The transcript of proceedings (R 42-43) indicates that the Appellant was not heard completely on the matter. The record clearly shows, at page 43, that counsel for Appellant expected to be heard at some later time when he stated:

"That's what I mean, your Honor. This will be resumed at 1:30."

Then the Court stated:

"On, no, the Court—this is the last case for the day."

Then further on, on the same page, the Court stated:

> "Well, but then the Court wants to take that into consideration. We don't have time. The Court's indicated that he wants to adjourn and is going to adjourn. * * *"

The rest of the discussion on page 43 also indicates that the matter was not concluded by that particular hearing, but no further argument was ever held before the Court indicated that he had granted summary judgment. (R 20.)

The record does not directly show that the argument on December 23rd was the only argument, but the Appellant's motion for new trial and to set aside judgment and to strike does indicate this to be the case. Paragraph four of this motion reads as follows:

> "4. That the proceedings were irregular herein for the reason that the decision was rendered in this case before Plaintiff had been given an opportunity of argument and presentation of evidence, although defendant had fully presented oral argument and evidence in the form of affidavits; that said statement is supported by a letter from the Clerk of the District Court, dated January 10th, 1956, advising that motion for summary judgment had been granted." (R 32.)

It should also be noted that the Court's decision on the question of summary judgment occurred even before January 10, namely, on January 6, 1956, as is indicated by the minute order rendering oral decision of the date. (R 20-21.)

Had the Appellant been given time and chance to do so, evidence on several matters would have been

introduced on the issues involved herein. The Appellant was never given a chance to argue, or to show, that the statement of the amount due in the total sum of $214.68 was given to the Appellees on the 23rd day of December, 1955. Nor was the Appellant ever given a chance to show that the items contained in said statement were correct or were at least the minimum amounts due. No evidence, other than oral discussion was given to show that the cost of the undertaking was $40.00. Nor was the Appellant given a chance to show that the Marshal's fee in the action was $15.80 and that the late charge was $6.04, nor was evidence given on the cost of storage which actually was more than $5.00.

It is true that some of these points were brought out after the Court had made his decision on the question of summary judgment, but as soon as the Appellant found that the Court was going to grant a summary judgment the Appellant did object. (R 21.)

The objections to proposed findings of fact and conclusions of law and proposed judgment were filed on January 11, 1956, which is the same day that the proposed findings of fact and conclusions of law and judgment were filed. However, the hearing on the objections was not held until January 31, 1956, after both findings of fact and conclusions of law and judgment had been signed by the judge on January 26th. (R. 30-31.)

It is true that the work load of the District Court for the Third Judicial Division for the Territory of Alaska is extremely high. An overworked judge can't

be expected to keep all the details of every case in mind. Even so, an overloaded calendar is not sufficient justification for the disposition of a litigant's case without giving him a chance to be heard. That has occurred here.

D. THAT THE MOTION FOR SUMMARY JUDGMENT WAS SET FOR HEARING THREE DAYS AFTER THE FILING AND SERVICE OF SAID MOTION, CONTRARY TO RULE 56 (c) OF THE FEDERAL RULES OF CIVIL PROCEDURE, AND THE LOWER COURT ERRED IN HEARING SAID MOTION THREE DAYS AFTER SERVICE UPON APPELLANT. (Point 5.)

There can be no question whatsoever but that the time set for the hearing of the motion for summary judgment conflicted with Rule 56(c) of the Federal Rules of Civil Procedure. The rule clearly states:

> "The motion shall be served at least 10 days before the time fixed for the hearing. * * *"

In this case the motion for summary judgment was dated December 20, 1955, and served and filed on the same day. (R. 6.) A notice of motion for summary judgment set the time for the hearing of the motion at 11:00 A.M. on the 23rd day of December, 1955, and this notice, too, was also served and filed on the same day as the motion. (R. 5.) Three days was the time set here, and this time was set by the moving party, the Appellees herein.

The argument will, of course, be urged that no objection was taken at the time to the setting of the hearing just three days after the filing and service of the motion. However, as a practical matter, if the

minimum time of ten days had been allowed, this case would probably not be before this Court on appeal at the present time. This conclusion can be reached because the ten days would have allowed counsel for both parties, and the Court, to be better prepared, and better informed as to both the facts and the law of this case. The record indicates that there must have been some confusion on the part of the lower Court in making his determination before completion of the hearing on motion.

The record also indicates that the Appellees were rushing the whole matter for reasons that are not obvious. The two affidavits of the Appellees in support of their motion were executed on the 20th day of December, 1955. (R. 11, 14.) Both affidavits indicate that on December 19th, offers and discussions were had with the Appellant's manager, Mr. Bollen. Thus it appears that the evidence was made on December 19th; the affidavits, motion for summary judgment and notice of motion were drafted on December 20th; and the hearing was set for December 23rd. No showing was made as to why such a rush was necessary, but it apparently worked to the advantage of the Appellees since the summary judgment was granted. Had Rule 56(c) been followed the resultant abuse of this case, in all probability, would never have followed.

It should also be noted that Rule 56(c) specifically provides for a ten day period after filing the motion. This is an exception to the time of five days set by Rule 6(d) for motions generally. The motion for summary judgment did not even meet the time require-

ments of Rule 6(d), since only three days' notice was given for the hearing.

E. THAT THE MOTION FOR SUMMARY JUDGMENT WAS NOT PROPERLY BEFORE THE COURT SINCE THE MOTION FOR SUMMARY JUDGMENT WAS NOT RESPONSIVE TO THE ALLEGATIONS OF THE COMPLAINT.

The complaint filed in this action (R. 3-5) was an action to replevin the vehicle involved herein. Whereas the motion for summary judgment was for judgment against the Appellant in the amount of $607.25 plus interest and attorneys' fees, in addition to asking for an order to return the automobile. The possession of the automobile was undoubtedly an issue in this case that was raised by the complaint, but the question of this sum of $607.25 has been raised nowhere in any of the pleadings other than in the motion for summary judgment, which does not even set forth the reason for the request. We thus end up with findings of fact and conclusions of law and judgment that are not even based upon pleadings, much less on the evidence.

Another point to consider is that since the Appellees have never denied the allegations of the complaint it must be assumed that they admit all matters well pleaded in the complaint. Yet the judgment granted does not take into consideration some of these allegations. Two of the items to be considered are the allegation that the Appellant was entitled to the possession of the automobile and the allegation that the Appellant was damaged in the amount of $50.00 for the cost of recovering said personal property. The judgment

herein does not dispose of either of these particular points, although the Court did order the automobile returned to the Appellees by other orders. However, no mention has even been made in the judgment or findings of fact and conclusions of law concerning the damages of the Appellant in recovering the property upon which default had been permitted. Although this may not be of great importance, it does show the inconsistent pattern of all the proceedings herein.

F. THAT THE LOWER COURT ERRED IN REFUSING TO GIVE EFFECT TO AN ACCELERATION CLAUSE IN THE CONDITIONAL SALES CONTRACT AND HOLDING THAT ACCELERATION CLAUSES ARE INVALID.

The Appellant concedes that the general rule appears to be that acceleration clauses in the usual conditional sales agreement under the Uniform Conditional Sales Act are uninforceable. However, the acceleration clause in this case concerns the acceleration of a note and the clause is quoted in the statement of the case. (R. 12.) It should be noted that the clause refers to "this note."

Unfortunately the record does not include a copy of the complete instrument involved herein although this instrument was pleaded as Exhibit "A" in the complaint. (R. 3.) And the complaint stated that it was "made a part hereof as fully as if set forth herein in full."

Regardless of the fact that the complete instrument has not been printed in the record, the note is obviously

a part of the whole transaction. Since the acceleration clause merely refers to the acceleration of maturity by default of installment payments on the note, this raises a somewhat different question from the question of acceleration of the conditional sales contract.

The rule on the question of acceleration of a note appears to be clearly set forth in 8 Am. Jur. 30, Section 286, of Bills and Notes:

> "Instruments payable at fixed times frequently provide that if an instalment of interest or principal is not paid when due, the holder of the instrument may declare the whole debt due. This option of the holder to declare the whole debt due must be exercised within a reasonable time. The exercise of the option may be effected by a demand upon the person primarily liable upon the instrument. * * *"

The last proposition is supported by a case that stands for the proposition, as indicated in the footnote (8 Am. Jur. 30):

> "One is not prevented from declaring a note the principal of which is payable in instalments immediately due for nonpayment of an instalment, as provided in the contract, because of simultaneous default in payment of usurious interest, and because of the provision of the statute that any agreement to pay usury is void, that no action to recover interest shall be maintained, and that the debt cannot be declared due until the full period of time it was contracted for has elapsed. *Haines v. Commercial Mortg. Co.,* 200 Cal. 609, 254 P. 956, 255 P. 805, 53 A.L.R. 725."

Since the printed record does not include the whole of the note involved herein, further discussion of the acceleration question appears remiss. However, it appears abundantly clear that the Court below did not consider or dispose of the mixed question of law and fact concerning the acceleration of the note. This was just another result of the rushing and confusion below which in turn, caused the incredibly summary treatment accorded this question of summary judgment.

CONCLUSION.

In conclusion Appellant submits that the Court below has followed neither the spirit nor the letter of Rule 56 of the Federal Rules of Civil Procedure and that the arbitrary determination of genuine issues of material fact and the failure to dispose of others can only be remedied by a reversal of the judgment herein.

Dated, Anchorage, Alaska,
January 25, 1957.

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